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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. [redacted]

BARKER DUNCAN, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

RESPONDENT'S BRIEF ON THE MERITS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 1037.

BARKER DUNCAN, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

THE OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the court below will be found in 146 S. W. (2d) 112 under the title of "Duncan vs. Thompson." The opinion on the motion for rehearing in the court below will be found in 146 S. W. (2d) 123.

STATEMENT OF THE CASE.

This is a proceeding by certiorari to review the opinion and judgment of the Springfield Court of Appeals, a Missouri court of appellate (and in this case, of final) jurisdiction, in the case of *Duncan* v. *Thompson*, 146 S. W. (2d) 112-128. Defendant Thompson was and is

trustee of Missouri Pacific Railroad Company. Plaintiff Barker Duncan was in his employ in interstate commerce. Duncan's action was for damages under the Federal Employers' Liability Act for personal injuries alleged to have been sustained by him in the course of his employment due to the alleged negligence of the employer. In addition to other defenses not now material, the answer of the defendant included a plea in abatement (Tr. 10-11). The plea in abatement alleged that after Duncan sustained his alleged injuries and before he commenced this suit the defendant (Thompson, as trustee of Missouri Pacific Railroad Company) paid to Duncan the sum of $600.00, and that thereupon said Duncan, by instrument of writing, contracted and agreed as follows:

> "In consideration of said payment of $600 I agree with said trustee that I will endeavor in good faith to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted and I elect to bring suit I will first return said sum of $600.00 to said trustee *and said return shall be a prerequisite to the filing and maintenance of any such suit.*"

The plea further alleged that Duncan, before commencing this action, did not tender or repay to the employer said sum of $600.00 and

> "that this suit and action have been begun and commenced by plaintiff without the prerequisite return to defendant trustee of said sum of $600, and plaintiff could not and cannot lawfully file or maintain this suit and action against defendant and this action is premature and should be dismissed by the court" (Tr. 10-11).

The agreement between Duncan and his employer not to sue without first returning the sum of $600.00 to the employer is Exhibit "D" (Tr. 18-20).

To this plea in abatement Duncan filed a replication (Tr. 115-119). The replication contained the following averments:

(a) Exhibit "D" is void under the express provision of the Federal Employers' Liability Act, 45 U.S.C.A., sec. 55.

(b) That Duncan received the sum of $600.00 from his employer "not as a release of any cause of action which he might have, but only as part-payment in settlement for injuries received while in the employ of the defendant."

(c) That Exhibit "D" was not signed by the employer or any of his agents, servants or employees.

(d) That Exhibit "D" was procured by fraud, practiced on Duncan by the employer, the fraud being that employer represented to Duncan that the $600.00 was part payment for compensation due the plaintiff under the Missouri Workmen's Compensation Act; that employer at the time assured Duncan that his cause of action was governed by the Missouri Workmen's Compensation Act, that his injuries came thereunder, and that under said act plaintiff would be entitled to further compensation by reason of his disability. That employer fraudulently represented that employer would honestly and earnestly try to make a settlement which would adequately compensate Duncan for his injuries, but that employer failed and refused to negotiate settlement and told the plaintiff "that he would have to * * * return

said sum of money to the defendant before he could sue'' (Tr. 117).

(e) The replication further alleged that employer withheld from Duncan his superior knowledge as to the law and facts governing and controlling the accident; that employer knew that said accident was governed by the Federal Employers' Liability Act and not by the Missouri Workmen's Compensation Act; that Duncan relied upon said statements of the employer's agents and ''that had the true facts been stated to the plaintiff by the defendant, his agents, servants and employees, he (plaintiff) would not have signed said instrument, which was procured by trickery and fraudulent representations as herein alleged'' (Tr. 118).

(f) The replication further alleged that Exhibit ''D'' is not an agreement as alleged in the amended answer, ''but as a matter of fact it is only a receipt for $600.00, which receipt is attached to the bottom of the recital of what is purported to be an agreement, and in fact neither the plaintiff nor the defendant ever signed the purported agreement (Tr. 118).

(g) The replication further alleged that when plaintiff was requested to sign Exhibit ''D'' he saw printed thereon the words ''in full for the above account'' and that before signing, Duncan inquired of employer's claim agent if those words meant he was making a full settlement, whereupon the claim agent explained that the instrument was only a receipt for the $600.00 as partial payment and that the check or draft would so show; that the claim agent made out the draft for $600.00 and showed it

to Duncan and when plaintiff saw that the draft specified "partial settlement" Duncan signed the receipt.

(h) The replication further alleged that the employer, at the time of the execution of Exhibit "D," knew that Duncan was seriously and permanently crippled and that said partial settlement was made solely for the purpose of using the money for his own injuries and that (*sic*) of an afflicted wife; that Duncan has spent the money, has no other money and is not able to repay employer; "that all of said facts were known to the defendant * * *. Plaintiff hereby offers to credit the defendant with said sum of $600 with interest thereon at six per cent (6%) from day of payment thereof, as against any judgment plaintiff may recover against the defendant according to the terms of the Federal Employers' Liability Act" (Tr. 119).

The *nisi prius* trial resulted in a verdict for plaintiff. Employer's claim agent testified at the trial that he did not represent to Duncan that the case fell under the Missouri Workmen's Compensation Act and that he told Duncan that his case was under the Federal Act (146 S. W. (2d) 118, Tr. 95-96). Duncan himself testified that he signed Exhibit "D:" that he read it over before he signed it; that a copy was furnished him and that he carried the copy away with him when the draft was given him, that he particularly noticed the provision in Exhibit "D" against bringing suit without return of the $600 (146 S. W. (2d) 117, Tr. 93-94), and that he had not offered to return the $600. At the close of Duncan's case the defendant requested the court to instruct the jury that Duncan's failure to repay the $600 "is a com-

plete bar to the further prosecution of the action now before the jury and that plaintiff cannot now maintain said suit or action, and the court now withdraws this suit or action from further consideration by the jury and dismisses the same without prejudice to plaintiff, and the jury is discharged herefrom" (Tr. 21). That instruction was refused. By the verdict, the jury found for plaintiff, assessed his recovery at $5691.00, less the sum of $600 principal and $91 interest, leaving the net assessment of $5,000.00 in favor of Duncan (Tr. 32). Judgment was entered on the verdict. Employer's motion for new trial was overruled and employer appealed to the Springfield Court of Appeals, that being the appellate court which, under the constitution of Missouri, was vested with jurisdiction.

Duncan was injured on April 10, 1936 (Tr. 5). The $600 payment was made to Duncan on August 13, 1937 (Tr. 19), more than 16 months after the date of the accident. Duncan did not cash the draft until September 14, 1937 (Tr. 20). On cross examination Duncan testified "the draft bears date of August 13, 1937 * * *. I carried the draft around about a month before I cashed it. I cashed it on the 15th day of September." (146 S. W. (2d) 117.) This suit was filed April 4, 1938 (Tr. 4).

The Springfield Court of Appeals unanimously reversed the judgment "with directions to the trial court to dismiss plaintiff's suit and render judgment for the defendant for his costs." (146 S. W. (2d) 123.)

Duncan filed a motion for rehearing (Tr. 106-115) and a motion to modify the opinion (Tr. 115-124). Both motions were overruled (Tr. 124), but the Springfield Court of Appeals wrote an additional opinion (146 S. W. (2d) 123-128, Tr. 124-135).

Thereafter, Duncan sought a review of the opinion of the Springfield Court of Appeals by petition to the Supreme Court of Missouri for a writ of certiorari (Tr. 139-142). The Supreme Court of Missouri denied the petition for the writ (Tr. 137).

The case is now here on Duncan's petition for a writ of certiorari to review the opinion of the Springfield Court of Appeals.

The Springfield Court of Appeals, in the opinion under review, held substantially as follows:

1. That Exhibit "D" is not a contract or device within the meaning of the Federal Employers' Liability Act (45 U.S.C.A., section 55).

2. That Duncan could not lawfully sue without returning or offering to return the $600 paid to him under the provisions of Exhibit "D."

3. That Duncan's replication and evidence in support thereof tended to show only "fraud in the treaty, but not in the factum." That under well established rules of law an agreement procured by fraud in the treaty as distinguished from fraud in the factum may not be disregarded or rescinded without a return or tendered return of the consideration, and that this case falls within that rule. That it is only in cases of fraud in the factum—*i. e.*, where one is induced by fraud to sign a paper whose purport has been misrepresented to him, so that the minds of the parties never met—that a written contract may be repudiated or rescinded without a return or tender of the consideration, and that this is not such a case.

4. That Exhibit "D" "does not attempt to settle the cause of action, except upon the condition plainly provided therein—that the plaintiff elects to treat it as the final settlement of his cause of action—but confers upon him the power, at his election, to rescind the agreement by returning the $600 and making such return a prerequisite to the filing of a suit."

5. That the suit was not filed until nearly a year after the contract was signed, at which time plaintiff had the benefit of advice of counsel, "and if plaintiff's counsel had made a competent investigation of the question he would have been forced to the conclusion that the alleged fraud was not sufficient to excuse the plaintiff from making restitution."

6. That "so long as the plaintiff held onto the $600 and refused to return it to the defendant, the contract was a complete accord and satisfaction—as much so as if there was no provision authorizing the plaintiff to rescind the agreement by returning the $600. Under an implicit (explicit) provision of the contract, the plaintiff could only bring a suit by returning to the defendant the $600, and this is made a prerequisite to the filing and maintenance of the suit. If the plaintiff failed to return the $600, he could not maintain his suit. Such failure constituted a complete bar. This means and can only mean, that the failure to return the $600 before bringing the suit constituted a complete accord and satisfaction."

7. That "in the instant case the plaintiff received the $600 under the express unambiguous contract that he could not sue under his common law cause of action without returning the $600 to the defendant, and the return is made a condition precedent to the right to bring such a suit. Under such a contract he may not litigate his claim 'while clinging to the fruits of the contract which he affects to disaffirm.' In the instant case he seeks to disaffirm, not in accordance with its express terms, but in violation thereof, by giving the defendant credit for the $600 if he recovers a larger sum. If he fails to recover, then he seeks to retain the $600 as an accord and satisfaction of his cause of action." 146 S. W. (2d), l. c. 128.

Petitioner has presented two questions for review by this court:

1. The court erred in holding that Exhibit "D" constituted a compromise or release and that it circumvented the Federal Employers' Liability Act, thereby defeating petitioner's cause of action created by the Act.

2. The court erred in holding that the $600 loan and the interest thereon, not refunded before suit, barred petitioner's cause of action in view of Section 55 of the Federal Act, which provides that appellant shall receive such sum contributed as a set-off.

These are the alleged errors which petitioner specifies at page 23 of his brief.

SUMMARY OF ARGUMENT.

1. The only federal question presented is whether Exhibit "D" is a contract which, under the Federal Employers' Liability Act (45 U.S.C.A. 55), the parties were forbidden to make.

2. Exhibit "D" was a covenant not to sue.

3. A covenant not to sue is in the nature of a contract of release.

4. If the Federal Act does not prohibit an injured claimant from releasing his cause of action for a consideration, by parity of reasoning it ought to be held that the Act does not prohibit him from covenanting for a consideration not to sue on his cause of action.

5. Every court which has considered the question, has come to the conclusion that the Congress, by Section 55 of the Act, did not intend to prohibit an injured claimant from compromising his disputed claim and from releasing the same.

6. The courts and text writers are unanimous in saying that the purpose of Congress was to prohibit employer and employee, *before* injury of the latter, from contracting to exempt the employer from the liability created by the Act, and not to prevent the parties from contracting *after* injury.

7. Petitioner having accepted the substantial sum of $600 in consideration of his covenant not to sue, cannot disaffirm his covenant and sue in violation of it "while clinging to the fruits of the contract which he affects to disaffirm."

8. The decision under review was correct in holding that the Federal Employers' Liability Act (45 U.S.C.A., par. 55) did not invalidate Exhibit "D."

ARGUMENT.

The petitioner comes to this court asserting that Exhibit "D" is a contract prohibited by the Federal Employers' Liability Act (45 U.S.C.A., Sec. 55). Both of his specifications of error are based on that contention.

The Federal Act does provide:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void * * *" (45 U.S.C.A., sec. 55).

At the outset, an effort should be made to determine the character of Exhibit "D." What is it? What is its purpose? Is it supported by a consideration and if so, what obligations or duties are imposed upon the party receiving the consideration?

Respondent asserts that Exhibit "D" was a *covenant not to sue*. It expressly provides:

> "I agree that if * * * I elect to bring suit I will first return the said sum of $600 to said trustee and said return shall be a prerequisite to the filing and maintenance of any such suit * * *" (Tr. 19).

Here petitioner has received a cash consideration of $600 in exchange for which he agrees that he will not sue on his claim without first restoring the consideration to his employer. That makes it nothing more and nothing less than a covenant not to sue. Whether he has a good cause of action or no cause of action he covenants not to molest his employer with a suit.

> "A covenant not to sue is a covenant by one who had a right of action at the time of making it against another person by which he agrees not to

sue to enforce such right of action. Such a covenant has been held to be a legitimate subject of contract." 53 C. J. 1197, paragraph 3.

"*Indicia* of a covenant not to sue may be said to be: 'No intention on the part of the injured person to give a discharge of the cause of action or any part thereof, but merely to treat, in respect of not suing thereon (and this seems to be the prime differentiating attribute), full compensation for his injuries not received, but only partial satisfaction; * * *.'" *Smith* v. *Dixie Park, etc., Co.*, 128 Tenn. 112, 157 S. W. 900.

It being established that Exhibit "D" is a covenant not to sue, the question arises whether the Congress in enacting Section 55 of the Federal Act intended to prohibit an injured person from contracting for a consideration not to sue for damages sustained by reason of an alleged violation of a duty enjoined by the Act upon his employer.

If the Act prohibits the making of a covenant not to sue, then logically it would seem to prohibit a contract of settlement, yet thus far no court has so construed the Act. Suppose petitioner had effected a compromise settlement with his employer in this case for the sum of $600 and had given a complete release. Suppose thereafter he had instituted this same suit to recover damages under the Employers' Liability Act and that the defendant had pleaded the contract of settlement and the release in bar of the action. Suppose then petitioner had naively replied that the contract of settlement and the release were both void under Section 55 of the Act, constituting no bar to the maintenance of the action, but merely permitting the employer to be credited on the judgment with the amount paid for the release. Would

any court sustain that replication as a good and valid plea? Would not such a plea be stricken out and would not any court, and particularly this court, sustain the order striking it out?

Yet the Act says:

"Any contract * * * shall * * * be void."

Suppose petitioner had never executed Exhibit "D," nor otherwise contracted in any way with reference to the rights secured to him by the Federal Employers' Liability Act. Suppose then that petitioner had filed an action against his employer to recover damages for personal injuries sustained by him due to the alleged failure of his employer to comply with a duty enjoined by the Act, and suppose petitioner had recovered a judgment for $10,000 and that the same was satisfied by payment. Then let us suppose that thereafter the petitioner filed a new suit to recover for the same injuries, praying damages in the sum of $100,000. Suppose the employer filed an answer alleging the rendition of the $10,000 judgment on the same identical cause of action and the satisfaction thereof. Suppose then that petitioner replied to that answer alleging that a judgment is a contract, being a contract of record; that the previous judgment was therefore only a contract and being a contract was prohibited by Section 55 of the Act and that it could be given no other effect than as a set-off against the increased damages claimed in the new suit. Would this court or any other court sustain that as a good plea to the answer? Yet "the cases are numerous in which judgments have been declared to be contracts." 33 C. J. 1056, note 65. It would of course be held that Congress had no intention in using the word "contract" to include a judgment.

At page 29 of his brief, petitioner says:

> "The petitioner wishes to make clear to this court that he realizes that Section 55 does not make void contracts of settlements and compromises."

If a contract of settlement is not a "contract" within the meaning of Section 55, then why is a contract containing a covenant not to sue within the condemnation of that section?

Suppose that when petitioner was injured there were two railroads responsible for his injuries. Suppose he was able to effect an amicable settlement with one, but was unable to come to terms with the other. Suppose that in concluding his settlement with the one, that railroad tendered him a complete release for his signature—a "contract of settlement." Suppose his astute counsel declined to permit him to execute the "contract of settlement"—the release—for fear it would have the effect of releasing the other tort feasor, as was held in *L. & N. R. Co. v. Allen* (Fla.), 65 So. 8, L. R. A. 1915C 20. Suppose the claim agent of the settling carrier had then suggested that petitioner—instead of executing a full release—a "contract of settlement"—execute a covenant not to sue the settling carrier. Suppose then that petitioner had received a large sum from the settling carrier and that he executed a written instrument solemnly covenanting never to sue that carrier. Would any court say that that contract—that covenant not to sue—was invalid under Section 55 of the Act? We venture to say the answer is bound to be in the negative, yet what is the distinction between that supposed case and this case here? For no mere nominal sum—for no mere trifle—but for the substantial sum of $600, petitioner solemnly covenanted that he would not sue in this case. It was not an absolute

covenant never to sue; it was a qualified or conditional covenant—the condition being that he would not sue without first restoring to his employer the consideration of $600 received by him for his promise. The only difference between the supposed case and the instant case is that in the former the covenant not to sue was absolute, while in the latter the covenant was conditioned and qualified. But the qualification and condition was all in favor of petitioner. He had the option to rescind and disavow his covenant not to sue by a simple payment of money—a mere restoration—to the other party of the consideration received by him. The key to his prison was in his own hand. He had but to turn that key in the lock and be free of the "prison" of his covenant. In the supposed case, the claimant had no key. He had positively contracted for a substantial consideration never to sue. There was no condition or qualification. The covenant bound him always and forever. So we say that in the instant case petitioner had a contractual right of rescission, while in the supposed case the injured party had none. How in logic can it be said that in the supposed case the covenant not to sue was good, notwithstanding Section 55 of the Act, but in the instant case the covenant not to sue is void?

The learned judge who wrote the opinion now under review, in analyzing the opinion of this court in *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911, quotes from the Schubert opinion that part of it which shows that the Act as originally enacted in 1906 provided:

> "That no contract *of employment* * * * shall constitute any bar or defense * * *"

and that the Act in its present form as enacted April 22, 1908, is a mere amendment (146 S. W. (2d) 120, Tr. 99-100).

Did the Congress, in the amendment of April 22, 1908, by using the word "contract" instead of the previous words "contract of employment" mean to forbid contracts *after* injury, such as covenants not to sue, accords and satisfactions, compromise settlements and releases—or did it mean only to interdict contracts made *before* injuries giving rise to a cause of action?

It is perfectly apparent why Congress should have undertaken to prohibit contracts of employment and other contracts anterior to the event exempting carriers from the liabilities imposed by the Act. It was such a contract which this court struck down in the Schubert case. But it is difficult to perceive why Congress should have undertaken to prohibit the making of contracts of settlement *after* injuries or to prevent an injured person from dealing by contract for the disposal or settlement of his cause of action under the Act, *after* the accrual of that cause of action. The opinion under review, in speaking of the decision of this court in the Schubert case, says:

> "We are unable to find in the opinion anything that would indicate that the statute was intended to cover such settlements and compromises entered into by the parties after the relation of employer and employee had been severed. The reasoning of the court would seem to be to the contrary * * *. There is no question but what under that case (the Schubert case) Congress would have the power to render such contracts of settlement void, even after the cause of action accrued, and confine the company's right to a set-off of the amount that it might have paid under any such settlement or compromise. The

question here is not a question of the power of Congress, but whether Congress has exercised that power. That case does not directly decide the question, but its reasoning would seem to indicate that the statute does not apply to a compromise and settlement of an existing and completed cause of action. It certainly seems that if Congress had such a thought or desire, it would have employed some word indicating it, such as 'compromise,' 'settlement,' or 'accord and satisfaction.' The words 'any contract' in the section standing alone are, of course, broad enough to cover an accord and satisfaction, but when read in connection with the phraseology of the Act referring to 'insurance,' 'relief benefit,' or 'indemnity,' it does not cover such contract of settlement after the cause of action has accrued. This was undoubtedly true with reference to the 1906 Act which referred only to a 'contract of employment.' The 1908 Act still refers only to contracts that exempt the employer from liability created by the Act. A compromise and an accord and satisfaction of an existing cause of action does not exempt the employer from liability, but, on the contrary, expressly recognizes such liability and renders to the employee a *quid pro quo* therefor. The obligation does not arise solely out of the employment, but out of the injury or death through the negligence of the employer. The accord and satisfaction is a separate and independent contract and agreement only incidentally connected with the original contract of employment" (146 S. W. (2d) 120-121, Tr. 100-101).

In petitioner's brief it is said:

> "No distinction has ever been made between contracts made before or after injury attempting to limit the liability created by the Act" (petitioner's brief, p. 35).

That would be interesting if true, but it is not true. Thus, in the following cases it has been held that Section 55 of the Act only applies to contracts before injury and not to contracts of settlement made after injury.

Ballenger v. *Southern Ry. Co.*, 90 S. E. 1019, 106 S. C. 200.
Mitchell v. *Louisville, etc., R. Co.*, 194 Ill. App. 77.
Panhandle, etc., Ry Co., v. *Fitts* (Tex. Civ. App.), 188 S. W. 528.
Kusturin v. *Chicago, etc., R. Co.*, 287 Ill. 306, 122 N. E. 512.
Lindsay v. *Acme Cement Plaster Co.*, 220 Mich. 367, 190 N. W. 275.
Patton v. *Atchison, etc., Ry. Co.*, 59 Okl. 155, 158 Pac. 576.
Anderson v. *Oregon Short Line R. Co.*, 47 Utah 614, 155 Pac. 446.
Central of Ga. R. Co. v. *Hoban*, 102 S. E. 46, 24 Ga. App. 686.
Griffin v. *New York, etc., R. Co.*, 279 Mass. 511, 181 N. E. 839.
Carlson v. *Northern, etc., R. Co.*, 58 A. L. R. 1304, 82 Mont. 559, 268 Pac. 549.

In one of the cases above mentioned the Supreme Court of Oklahoma had this to say in a case where there was a contract of settlement and the plaintiff sought to have it invalidated under Section 55:

> "The sole question is whether or not the settlement is invalid and of no effect. If the contention of plaintiff that such a settlement is in conflict with the Federal Employers' Liability Act be true, every injury to a railroad employee falling within the terms of this Act must inevitably be brought to the courts for settlement, for if settlement in the sum of $100 be invalid, one in the sum of $10,000 would be equally so. To hold with the plaintiff would be to preclude

> the possibility of any settlement between the injured employee and the railroad company out of the courts * * *. It seems clear to us from a reading of the Section relied upon by the plaintiff and the opinions of the Supreme Court of the United States, from which excerpts have been above set out, that only contracts which attempt to relieve the railroad company from its liability *in anticipation of possible injury* come within the purview of this Act of Congress. In the instant case, the contract relied upon by defendant was a recognition of its liability and a satisfaction thereof, and if can in no sense be said that such contract seeks to exempt the defendant from liability for injuries occasioned to plaintiff under the terms of the Employers' Liability Act." *Patton* v. *Atchison, etc., Ry. Co.*, 158 Pac. 576, 59 Okl. 155.

So in the case at bar, there is nothing in Exhibit "D" which undertakes to deny the application of all of the Federal Employers' Liability Act, nor in anywise to exempt the carrier from the provisions of the Act. In effect it recites that petitioner asserts and the carrier denies liability, but that for the consideration of $600 petitioner covenants not to sue without first returning the $600 to the carrier.

If petitioner had not accepted the $600, his right to proceed under the Act would have been unimpaired. Because he was in need of $600 and in order to obtain it, he willingly contracted not to sue without putting his employer in *statu quo* by a restoration of the $600.00.

In another of the cases above mentioned, where a contract of compromise was under review, the court, in speaking of Section 55 of the Act, said:

> "The purpose of the foregoing provision was not to prevent the employer and his employee from compromising and settling any matters of difference

existing between them. In making such a settlement * * * no rights of either of the parties are frittered away, but, on the contrary, are firmly maintained. The right to make a compromise and settlement and enter into a release is a right of contract which, in our judgment, cannot be interfered with even by Congress. Of course, Congress may deprive the employer of the common law defenses and may prevent an indirect enforcement thereof; but it may not prevent the employee from adjusting his own affairs in his own way after a cause of action has arisen in his favor * * *." *Anderson* v. *Oregon Short Line R. Co.*, 47 Utah 614, 155 Pac. 446.

In another of the cases above mentioned, the employee, after sustaining an injury, executed a release to his employer in consideration of being furnished further employment for one day. It was held that Section 55 had no application to that transaction. *Panhandle, etc., Ry. Co.* v. *Fitts* (Tex. Civ. App.), 188 S. W. 528.

In the Massachusetts case of *Griffin* v. *New York, etc., R. Co., supra*, the plaintiff had given a release after injury. The court, in speaking of the Federal Employers' Liability Act, said:

> "A release under seal given by a plaintiff without fraud must bar his claim under that act." 181 N. E., l. c. 841.

Releases have always been held not to be "contracts" within the meaning of Section 55. Thus, in a standard text it is said:

> "An employee who has a claim against a common carrier for personal injuries may agree upon a settlement of his claim and accept a sum of money or other thing of value in settlement of said claim * * *. Such a release is not a contract, regulation, or device, the purpose and intent of which is to enable

the common carrier to exempt itself from liability under the statute." Roberts Federal Liabilities of Carriers (2d Ed.), vol. II, p. 1825, sec. 943.

The constitution of Montana makes it

> "unlawful for any * * * corporation to require of its servants or employees, as a condition of their employment *or otherwise*, any contract or agreement whereby such * * * corporation shall be released or discharged from liability or responsibility on account of personal injuries * * * and such contracts shall be absolutely null and void."

In considering whether that constitutional provision invalidated a release *after* injury, the Supreme Court of Montana said:

> "It was formerly held in some states that an employer could by contract relieve himself from liability for such injuries as an employee might *subsequently* receive while in his employment by reason of the employer's negligence. By a great preponderance of authority in this country such contracts were held to be void as against public policy and in many states they were prohibited by express statutory enactment. 5 Labatt, Mast. & S., sec. 1919. The foregoing constitutional and statutory provisions make the public policy of this state harmonious with the rule declared by the majority of the courts, without waiting for judicial declaration. The provisions do not in purpose and effect differ from the provisions of section 5 of the Act of April 22, 1908, chap. 149, 35 Stat. at L. 66 (U. S. C. title 45, sec. 55), which provides: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void.'

It is uniformly held that this provision only applies to agreements entered into *before* the accident occurs by which the employee receives his injuries, and that it does not prevent a contract for the settlement for injuries theretofore received. *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 190 N. W. 275; *Ballenger* v. *Southern R. Co.*, 106 S. C. 200, 90 S. E. 1019." *Carlson* v. *Northern P. R. Co.*, 82 Mont. 559, 268 Pac. 549, 58 A. L. R., l. c. 1309.

The Supreme Court of West Virginia has held that an employee suing under the Federal Act could not repudiate a release on the sole ground of mistake, in that his injuries were more serious than he had been led by physicians to believe at the time of signing the release. Thereby the West Virginia court clearly recognized the right of an injured employee to contract *after* his injuries, notwithstanding the provisions of Section 55. *Janney* v. *Virginian Ry. Co.*, 193 S. E. 187, 119 W. Va. 249.

The Supreme Court of Michigan has held that Section 55 applies only to agreements *before* the accident. In that case an injured party, having a claim against joint tort feasors, one of whom was a railroad company, effected a settlement with the railroad company and executed a release. In the action against the other tort feasor, it was contended in defense that the full release of one tort feasor had the effect of releasing the defendant joint tort feasor. Plaintiff contended that the release given by him to the railroad company was void under Section 55 of the Act. The court held, however, that the contract of settlement with the railroad company was not void under Section 55, since it applied only to contracts *before* injury, and that it was a complete defense to the other tort feasor. *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 190 N. W. 275.

In American Jurisprudence it is said:

> "While according to the great preponderance of authority in this country, a contract by an employer to relieve himself from liability for such injuries as an employee may *subsequently* receive while in his employment by reason of the employer's negligence is void as against public policy, or, by reason of a statutory enactment, an employer may, *after the happening of the injurious occurrence*, effectually contract with his employee, or the proper representatives of a deceased employee, for the release or settlement of a demand which is founded thereon and may accordingly, when sued by such employee, or his representatives * * * assert such settlement or release as a complete defense to the action * * *." 35 Am. Jur. 671, paragraph 238.

From all of the foregoing we conclude that, notwithstanding the breadth of the language used in Section 55, the courts have applied it only to anterior and anticipatory contracts of exemption, and not to contracts made *after* the accrual of the cause of action.

If, as so abundantly established, Section 55 does not forbid the release of an accrued cause of action under the Federal Act, then it follows that the Act does not forbid an injured person, after his injury, to contract for a consideration not to sue. A covenant not to sue, such as the one at bar, is not in any sense an exemption of an employer from the liability created by the Act. It is merely an agreement upon the part of the injured party that, for the consideration received, he will waive his right to enforce the liability created by the Act. It is not different in principle from a compromise and settlement. In the case of compromise, the parties in no sense exempt the employer from liability, but the injured party, in con-

sideration of the settlement, agrees not to enforce that liability. In the case at bar, petitioner received from his employer the sum of $600 in consideration of his agreement not to sue without first restoring the consideration. By the express terms of Exhibit "D" petitioner declared that the consideration was:

> "paid to me at my request * * *. The payment * * * shall not be considered as an admission of any liability on the part of said trustee or the railroad company, and I understand that the trustee and the railroad company deny liability for my injuries. In consideration of said payment * * * I agree * * * that I will endeavor in good faith to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600 to said trustee and said return shall be a prerequisite to the filing and maintenance of any such suit" (Tr. 18-19).

Petitioner admitted signing the instrument (Tr. 68) and that he read it over before he signed it (Tr. 72). He testifies that he called the claim agent's attention to the provision restricting his right to sue by saying:

> "Well, this states that you can't bring suit" (Tr. 68).

Thus, he fully understood the terms and conditions of his contract and so understanding, accepted the consideration and signed the contract. If the parties had agreed to compromise and settle petitioner's claim for $600 and if, instead of taking a release, the employer had taken an instrument in the form of a simple covenant not to sue, such covenant not to sue would have been treated as a release.

> "To avoid circuity of action, a covenant or agreement unlimited in time and scope not to sue the party or all the parties liable to the covenantor in contract or tort operates as a release and may be pleaded in bar of a subsequent action * * *." 53 C. J. 1245, paragraph 70.

The only difference between that situation and this is that in the instant case the covenant not to sue was conditional, the condition being that the covenantor might excuse himself from the covenant by repaying to his employer the consideration of $600. That limitation, however, is not against the petitioner, but in his favor, and the fact that the limitation is there does not alter the legal effect of his plain and unambiguous covenant not to sue. If he covenanted absolutely not to sue, the covenant is a complete bar to an action in violation of the covenant. Here, his covenant not to sue, although a conditional covenant, is still a complete bar because he elected not to rescind the covenant. He elected to breach his own solemn agreement that he would not sue without first restoring the consideration. He alone is guilty of that breach. He had a plain and fair election, one which he well understood, either to restore the consideration and enjoy his right to sue, or to keep the consideration and be confronted with his covenant not to sue. In its opinion, the Springfield Court of Appeals says, concerning petitioner:

> "His replication expressly admits that before suit was brought, and apparently several months before, he had been definitely informed by the defendant that he either had to return the $600 or forego bringing his suit, and after receiving advice of counsel he elected to bring his suit on the theory that it was covered by the Federal Employers' Liability Act" (Tr. 135).

The court was correct. The replication contains these words:

> "The defendant, his agents, • • • not only failed to perform their agreement to negotiate an amicable settlement, but refused to try to negotiate settlement with the plaintiff, and told the plaintiff that he would have to accept said $600 in full settlement of his claim, or return said sum of money to the defendant before he could sue • • •" (Tr. 117).

Petitioner's predicament is thus of his own creation. He fully understood that he had contracted not to sue without returning the $600, and he knew it in ample time to rescind before suing. He endeavored to excuse himself from the consequences of his failure to restore the consideration to his employer by asserting that he had no money or means and could not restore it (Replication, Tr. 119). But afterwards, he belied the truth of that contention by petitioning the Springfield Court of Appeals to modify its opinion:

> "so as to give the plaintiff an opportunity to make restitution to this defendant and proceed with his cause of action as now filed" (Motion to Modify, Tr. 123).

Judge Cardozo's opinion in *Brassel* v. *Electric Welding Company of America*, 239 New York 78, 145 N. E. 745 (mentioned by the Springfield Court of Appeals in the opinion on the motion for rehearing, Tr. 133-134), seems conclusive against the right of the petitioner at one and the same time to retain the fruits of his bargain and to repudiate it by undertaking to maintain this suit. In that case, the plaintiff had accepted an award under the New York Workmen's Compensation Act. That act provides that the liability of an employer thereunder shall be:

> **"exclusive and in place of any other liability whatsoever"**

on account of the injury sustained by the employee. In that opinion Judge Cardozo said:

> "In the light of this provision the employer, when it tendered payment of the award, affixed by implication the condition that the tender was made upon the statutory terms. The employee, by accepting payment, signified his assent to the condition, and his willingness to receive the money upon the terms thereby imposed. * * * He may not litigate his claim for damages while clinging to the fruits of the contract which he affects to disaffirm." (145 N. E., l. c. 746.)

The Springfield Court of Appeals, in the opinion under review, speaking of Judge Cardozo's opinion, said:

> "That case is directly in point in the instant case. The only difference is that there was an implied contract. In the instant case the plaintiff received the $600 under the express unambiguous contract that he could not sue on his common law cause of action without returning the $600 to the defendant, and the return is made a condition precedent to the right to bring such a suit. Under such a contract he may not litigate his claim 'while clinging to the fruits of the contract which he affects to disaffirm'" (Tr. 134, 146 S. W. (2d), l. c. 128).

We understand that this court on certiorari to review the decision of a state court, confines itself to the federal question presented and does not review questions of state law. *State of Missouri* v. *Public Service Commission*, 273 U. S. 126, l. c. 131, 47 Sup. Ct. Rep. 311, l. c. 313. The only federal question presented is whether the contract Exhibit "D" was invalid under Section 55 of the Act. This question we have fully treated. This court must say whether Exhibit "D" was valid or void under Section 55 of the Act. If it should conclude that

petitioner's covenant not to sue was void under the Act, then necessarily the decision under review will have to be reversed. If the court concludes, as we urge it should conclude, that Exhibit "D" was valid, and not prohibited by Section 55, then we take it the decision will be affirmed without any review of the questions of state law decided by the opinion. Those questions of state law we do not argue because they seem to be beyond the scope of review by this court on certiorari. We refer particularly to the state law of Missouri which requires a return of the consideration where a party seeks to disaffirm a contract on the ground of fraud "in the treaty" as distinguished from "fraud in the factum." The Missouri rule in that behalf is declared in the case of *State ex rel. order of U. C. T.* v. *Shain*, 339 Mo. 903, 98 S. W. (2d) 597.

We submit this case upon the proposition that the Congress in enacting Section 55, intended only to prohibit anterior contracts of exemption, and that it had no purpose to strike down subsequent contracts such as releases and covenants not to sue.

It is respectfully submitted that the decision under review should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1941.

Baker Duncan, Petitioner, vs. Guy A. Thompson, Trustee of Missouri Pacific Railroad Company.	On Writ of Certiorari to the Springfield Court of Appeals of the State of Missouri.

[January 12, 1942.]

Mr. Justice Black delivered the opinion of the Court.

April 10, 1936, petitioner Duncan, while performing duties as respondent's employee, fell from a locomotive and was injured. Since at the time he was working for a "common carrier by railroad" and in interstate commerce, the right to recover damages is governed by the Federal Employers' Liability Act. 35 Stat. 65. Sixteen months later, August 13, 1937, Duncan was still suffering from his injuries, his wife was in the hospital, and he needed money. On that day, upon Duncan's signing an instrument presented to him by the company's claim agent, he was paid $600 "for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of [his] claim." The instrument also stated that:

"In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit."

About eight months later, April 4, 1938, negotiations for settlement not having been successful, Duncan, without returning the $600, sued the respondent in a Missouri state court, charging that his injuries resulted from the negligence of the respondent's servants or agents. Among other pleadings the respondent filed a plea in abatement alleging that "this suit and action have been begun and commenced by plaintiff without the pre-requisite return to defendant trustee of said sum of $600, . . . and this

action is pre-mature and should be dismissed by the Court." Duncan replied that the agreement, so far as it purported to create a condition precedent to bringing suit, was void under Section 5 of the Federal Employers' Liability Act, 35 Stat 65, 66, which in part provides:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ."

The trial judge held the agreement did not bar Duncan's suit, but submitted the issues of negligence to the jury with instructions that if their verdict should be for him the railroad would be entitled to a credit of $600 and interest. The verdict was for Duncan and after appropriate subtraction for the prior payment to him, judgment for $5,000 was entered in his favor. The Springfield Court of Appeals reversed, holding that the invalidating effect of Section 5 does not extend to contracts made after an employee is injured, 146 S. W. 2d 112, and the Missouri Supreme Court declined to review its action.

In *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 611, this Court referred to Section 5 as follows:

"The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act.' It includes every variety of agreement or arrangement of this nature . . . ."

While this interpretation is broad enough to bring within Section 5 contracts made after as well as before the injury, the agreement at issue in the *Schubert* case was made prior to the injury, and the actual decision therefore does not control agreements which, like that now before us, are made after the injury has occurred. Moreover, several state courts have expressed the view that contracts made after the injury has occurred are not invalidated by Section 5. See, *e. g.*, *Ballenger* v. *Southern Ry. Co.*, 106 S. C. 200, 203; *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okla. 155, 156; *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 577; *Carlson* v. *Northern Pac. Ry. Co.*, 82 Mont. 559, 568.

Because of this divergence of judicial opinion as to the interpretation of Section 5, and because the scope of Section 5 is of

fundamental importance in the administration of the Federal Employers' Liability Act, we granted certiorari.

Section 3 of the first Federal Employers' Liability Act[1] passed by Congress in 1906 provided that "no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, ~~nor the acceptance of any such insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee,~~ nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. . . ." The court below, taking the position that the word "contract" as used in Section 3 referred only to contracts entered into before the injury occurred, concluded that Section 5 of the present act is no broader in this respect, but merely includes contracts, rules, regulations, or devices in effect before the injury. In our opinion, the difference in the language of the two sections and the legislative history of the later one cannot be reconciled with this conclusion.

It is clear from the Congressional committee hearings and reports on the Federal Employers' Liability Act now in force not only that close study was made of the entire 1906 Act and in particular of Section 3, but also that considerable attention was given to state employers' liability acts and experience under them. Section 3 was incorporated verbatim in one of the two bills introduced in the Senate, but it was the bill containing the broader language of the present Section 5 that survived consideration. See Hearings on S. 3080, February 20, 1908, p. 3, and compare Senate Report No. 460, 60th Cong., 1st Sess., p. 4. Without more, the change from "contract" to "any contract, rule, regulation, or device whatsoever" would seem to be an enlargement ample to include agreements made after the event of injury.

But there is more. Under the state acts there had been widespread attempts by employers to contract themselves out of the liabilities the acts were intended to impose. State legislatures had responded to this practice by adopting provisions which proscribed employer-employee agreements intended to deprive employees of the statutory benefits. These provisions varied in scope and language. Some declared agreements attempting to exempt employers from liability

[1] 34 Stat. 232. This act was declared unconstitutional in The Employers' Liability Cases, 207 U. S. 463.

void only when they were part of contracts of employment. One state, although not limiting the statutory invalidation to contracts of employment, specifically restricted it to agreements "entered into prior to the injury." Other states, presumably after experience had shown that narrower limitations were inadequate to stamp out ingenious evasions of the statutory responsibilities, adopted measures invalidating agreements of any type, regardless of when made, which attempted to exempt employers from liability. House Report No. 1386, 60th Cong., 1st Sess., pp. 30-75.

The report of the House Judiciary Committee on the second Federal Employers' Liability Act set out all of the state statutes then in effect. Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of Section 3 of the old act indicates a deliberate abandonment of the limitations of that section. And the adoption of Section 5 of the present act without adding any of the other limitations which some of the state statutes had embodied argues persuasively that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.

Concluding that the phrase "any contract, rule, regulation, or device whatsoever" as used in Section 5 comprehends the instrument signed by Duncan long after he had been injured, we turn to the remaining question: whether "the purpose or intent" of the instrument was to enable the respondent "to exempt itself from any liability created by [the] Act." The instrument prepared by the respondent for Duncan's signature purported to create a condition precedent to his bringing suit, the refunding of $600. By its terms, unless this condition were satisfied—and in view of Duncan's straitened circumstances the probability of satisfaction would seem negligible—Duncan's only means of enforcing such liabilities as should have been assumed by the respondent would be taken from him. Hence, the agreement, if valid, would effectively exempt the respondent from liability under the act no matter what the merits of Duncan's claim.

The respondent contends, however, that Section 5 does not invalidate compromises of disputed claims, and that the agreement here is in the nature of a conditional compromise. We need not here determine what limitations, if any, Section 5 places upon the validity of agreements not to sue if made in consideration of a bona

fide compromise and settlement of claims arising under the act, because the very language of the agreement indicates it is not a compromise and settlement. While the agreement does contemplate the possibility of future settlement, it expressly stated that the $600 was advanced "for living and other expenses pending further developments as to the extent and effect of . . . injuries and negotiations for settlement of [the] claim." And the claim agent of the respondent testified that the agreement was in a form regularly used by the respondent when its employees "had a long disability period like he [Duncan] had had . . . to tide them over until they had their recovery before we negotiate final settlement." We are unpersuaded, therefore, by any argument which depends upon treating the agreement signed by Duncan as a compromise.

The judgment of the Springfield Court of Appeals is

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.